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SOME MISAPPREHENSIONS AS TO FEDERAL PROCEDURE AND JURISDICTION.

The following paper—read by Judge Henry C. McDowell at the last meeting of The Virginia State Bar Association—is of such practical value to both the older and younger members of the Bar that we have requested his permission to publish it. He assigns the following very good reason for its compilation:

"The difference between the practice in the Virginia state courts and in the federal courts in this state cause many of the commonest difficulties and therefore present a topic for a useful paper, if adequately treated; but one that is too comprehensive for the present occasion. Accordingly I shall attempt merely to deal with such of the misapprehensions concerning federal procedure and jurisdiction, as are according to my observation most common."

GENERAL TOPICS.

Times and Places of Session of Federal Trial Courts.

To some of the bar the statutes fixing the times and places of the regular sessions of the federal trial courts in this state are not readily accessible. At present the provisions of the law are as follows:

EASTERN DISTRICT.—The regular terms of the Circuit and District courts for the Eastern District of Virginia are held at Richmond, commencing on the first Monday in April and October; at Alexandria on the first Monday in January and July; at Norfolk on the first Monday in May and November. Sec. 572, U. S. Rev. Stats.; 4 Fed. Stats. Ann. 671; Desty Fed. Proc., § 120; 1 U. S. Comp. Stats. 474.

WESTERN DISTRICT.—The regular terms of the Circuit and District courts for the Western District of Virginia are held at:

Big Stone Gap.—Fourth Monday in January and second Monday in August.

Abingdon.—Tuesday after the first Monday in May and October.

Roanoke.—Third Monday in February and June. (Jury trials actually commenced on the Tuesday following.)

Danville.—Tuesday after second Monday in April and November.

Lynchburg.—Tuesday after second Monday in March and September.

Charlottesville.—Second Monday in January and first Monday in July.

Harrisonburg.—Tuesday after first Monday in June and December. 34 U. S. Statutes at large 546; Supp. 1907 Fed. Stats. Ann. 212; Supp. 1907 U. S. Comp. Stats. 174.

Division between Eastern and Western Districts.

In this connection it may be well to say that the counties of Clarke, Warren, Rappahannock, Madison, Greene, Albemarle, Fluvanna, Cumberland, Appomattox, Charlotte, Halifax and the counties west thereof compose the western judicial district; the counties east thereof compose the eastern district. Sec. 549, 437; Desty Fed. Proc., § 16.

Vacations.

It is so often the case that valuable time is wasted because of the belief that the federal courts are in vacation when they are not, that it seems not improper to state that both the federal trial courts at every place of session are in almost continuous session. The mere departure of the judge from a place of session does not indicate that the term has been brought to an end. Orders of adjournment so phrased as to close the term are practically never made, except at the close of the day just preceding the commencement of a regular or special term. And special terms are of rare occurrence.

Transfers.

Not infrequently litigation in the federal trial courts is carried on at a place of session that is unduly inconvenient to one, or

even both, of the parties, under an erroneous belief that a cause must remain at the place of session at which it was instituted or to which it was removed from the state court. It is a common practice to enter orders transferring causes from one to another place of session within the district in order to obviate undue expense or inconvenience. An application for transfer is made by motion, of which opposing counsel are given reasonable notice.

Authentication of Judicial Records.

The requisite formalities of authentication of judicial records when relied upon in the federal courts seem to give counsel no little trouble. If a record be certified in accordance with § 905, Rev. Stats. (3 Fed. Stats. Ann. 37; 1 U. S. Comp. Stats. 677), which is practically the same as § 3342, Code, 1904, it is believed that no possible objection can be sustained. Where the record sought to be used in a federal court in this state is from some other federal court, it has been held that § 905, Rev. Stats., does not apply. Turnbull *v.* Payson, 95 U. S. 418, 422; U. S. *v.* Wood, Fed. Cas. 16757; National Society *v.* Spiro, 94 Fed. 750. Where the record is from the state court of some state other than Virginia, if it is to be authenticated by certificates, it is believed that § 905, Rev. Stats., should be carefully followed. U. S. *v.* Biebusch, 1 Fed. 213, 215. But see Bennett *v.* Bennett, Fed. Cas. 1318. In case the record sought to be used in a federal court in this state is from a Virginia state court, the only authorities I have found indicate that compliance with § 905, Rev. Stats., is not necessary. See Mewster *v.* Spalding, 6 McLean 24, Fed. Cas. 9513; Turnbull *v.* Payson, 95 U. S. 418, 422; Bennett *v.* Bennett, 1 Deady 299, Fed. Cas. 1318.

The Present Judiciary Act.

The commonest misapprehension concerning the judiciary act of March 3d, 1875 (18 Stats. 470); as amended by the act of March 3d, 1887 (24 Stats. 552) as corrected by the act of Aug. 13, 1888 (25 Stats., 433)—see 4 Fed. Stats. 265, et seq.; 1 U. S. Comp. Stats. 508, et seq.; Desty's Fed. Proc., § 84, et seq.—is a belief that it is so written that "he that runs may read." I know of no statute that is more difficult of interpretation. My observation is that a mere reading of the language of the statute,

without careful consideration of the decisions construing it, is rarely ever sufficient. In fact in many important respects the statute means what the courts have said it means, rather than what it may seem to mean on a mere reading of its language.

The Amount in Controversy.

To illustrate, notice the first dozen lines of the first section of this statute:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states * * *"

A mere reading of this language, without reference to the decisions, raises a question of no slight difficulty as to which of the classes of controversies mentioned does the pecuniary limitation apply. However, the decisions enable us to say that where the ground of jurisdiction is diversity of citizenship, or that the controversy arises under the constitution, laws or treaties of the United States, the amount in controversy must exceed $2,000. Where the United States are plaintiffs or petitioners, or where there is a controversy between citizens of the same state claiming land under grants of different states, the pecuniary limitation does not apply. See U. S. *v.* Sayward, 160 U. S. 493; Fishback *v.* Telegraph Co., 161 U. S. 96, 99; Holt *v.* Indiana Co., 176 U. S. 68, 73.

In this connection it should be borne in mind that neither diversity of citizenship nor a value exceeding $2,000, in controversy is necessary in suits which are ancillary or supplemental to a suit pending in the federal court. In re Tyler, 149 U. S. 164, 181: Hughes' Fed. Proc., p. 266; Dabney Fed. Juris., p. 39;

Bates Fed. Eq. Proc., §§ 46, 97, 381; 1 Foster's Fed. Pr. (3d Ed.) p. 70, et seq.

In actions of ejectment, where the plaintiff sues for the recovery of a tract of land worth more than two thousand dollars, and the defendant seeks to defend only as to a small part of plaintiff's tract, worth less than two thousand dollars, an interesting question is raised as to what is the matter in dispute. There are opinions indicating a want of jurisdiction in such a case (Jones *v.* Rowley, 73 Fed. 286, 289; Stemmler *v.* McNeil, 102 Fed. 660; Cooper *v.* Preston, 105 Fed. 403). However, as at present advised, the writer inclines to the view that it is the value of the land described and sued for in the plaintiff's declaration which determines the federal jurisdiction. See Way *v.* Clay, 140 Fed. 352; Smith *v.* Smith, 204 U. S. 632.

The amount in controversy must be exclusive of interest and costs. But in Brown *v.* Webster, 156 U. S. 328, where a vendee of land sued his grantor for breach of warranty, the claim being for $1,200 purchase price an interest thereon sufficient to make the entire demand exceed $2,000, the federal circuit court was held to have jurisdiction. So also, in Edwards *v.* Bates County, 163 U. S. 269, it was held, that an action to recover the sum due on two one-thousand-dollar bonds, and on some overdue interest coupons thereof, was within the jurisdiction of the federal court. See also, Greene County *v.* Kortrecht, 81 Fed. 241, giving an excellent illustration of the meaning of the word "interest" as used in this statute. There the action was to recover on two matured $500 bonds, on several matured interest coupons, amounting to $688, and interest on the principal of the bonds since maturity. In this case it was held, that there was no federal jurisdiction.

Diversity of Citizenship.

My observation is that the commonest misconceptions in regard to this ground of federal jurisdiction arise in suits by or against representative parties. An admirable statement of the law is as follows, from Railroad Co. *v.* Thiebaud, 114 Fed. 918, 922.

> "It has been held, in numerous cases, that where the plaintiff in the suit has no interest, legal or equitable, in the recovery, but is put forward as a formal party in conform-

ity to some statutory appointment made for the purpose, the citizenship of the real party will furnish the test of jurisdiction so far as that party to the case is concerned. McNutt *v.* Bland, 2 How. 9, 11 L. Ed. 159; Huff *v.* Hutchinson, 14 How. 586, 14 L. Ed. 553; Maryland *v.* Baldwin, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822; Indiana *v.* Glover, 155 U. S. 613, 15 Sup. Ct. 186, 39 L. Ed. 243; Stewart *v.* Railroad Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. In this class of cases the nominal plaintiff has no title or interest in the subject of the suit, immediate or remote. He cannot control the litigation, and has no authority to meddle with it. On the other hand, it is well settled that where the plaintiff sues in the character of a trustee, being vested with the title to the subject of the litigation, even though it is destined to ultimately pass in due course to designated beneficiaries, it is his citizenship which is recognized in settling the question of jurisdiction. It is he who has the control of the action, and, so long as he faithfully discharges the duties of his trust, he is the only party to represent the interest he prosecutes. Coal Co. *v.* Blatchford, 11 Wall. 172, 20 L. Ed. 179; Knapp *v.* Railroad Co., 20 Wall. 117, 22 L. Ed. 328; Morris *v.* Landauer, 6 U. S. App. 510, 4 C. C. A. 168, 54 Fed. 23; Popp *v.* Railroad Co. (C. C.), 96 Fed. 465."

Residence in the District of Suit.

In the first section of the judiciary act is this clause: "But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

A very few of the misapprehensions as to meaning of this cause can be here touched upon.

The supposedly well-settled doctrine that the objection to federal jurisdiction of a controversy between citizens of the different states founded on the fact that neither is a resident of the district of suit could be waived (Central Trust Co. *v.* McGeorge, 151 U. S. 129), was shaken by a dictum in the opinion, by Mr. Chief Justice Fuller, in Ex parte Wisner, 203 U. S. 449, 460. However, two later decisions restore this doctrine. In re Moore (April 20, 1908), 209 U. S. —; Western Co. *v.* Butte Co. (June 1, 1908), 209, or 210 U. S. —.

An important rule as to this residence clause is that, where

there are several plaintiffs or defendants, all of the parties on one or the other side must be residents of the district of suit. Smith *v.* Lyon, 133 U. S. 315; Sweeney *v.* Carter Co., 199 U. S. 252.

In local suits, brought under the eighth section of the judiciary act, it has been held, that neither party need be a resident of the district of suit. See Greeley *v.* Lowe, 155 U. S. 58; Dick *v.* Foraker, 155 U. S. 408, 411; Merihew *v.* Fort, 98 Fed. 899; Grove *v.* Grove, 93 Fed. 865.

With reference to corporations chartered by a single state, it is considered as settled that such corporation is a citizen of the state which created it. (Shaw *v.* Mining Co., 145 U. S. 444; R. Co. *v.* Denton, 146 U. S. 202; R. Co. *v.* James, 161 U. S. 545; R. Co. *v.* Allison, 190 U. S. 326); and a resident of that district of the state of its creation in which the corporation has its headquarters. R. Co. *v.* Gonzales, 151 U. S. 496.

Where an action is commenced in a state court, by a citizen of another state, against a nonresident defendant who is a citizen of a state other than that of the plaintiff, a most interesting question is presented as to the jurisdiction of the federal court on removal. It was several times held, that the motion of the plaintiff in such a case to remand should be denied. See Petroleum Co. *v.* Hughes, 130 Fed. 585; Chemical Co. *v.* Insurance Co., 108 Fed. 452; Morris *v.* Clark Co., 140 Fed. 756. These decisions were based on the language used by the Supreme Court in Ex parte Schallenberger, 96 U. S. 369, and R. Co. *v.* Davidson, 157 U. S. 208, to the effect that the objection based on the fact that neither party is a resident of the district is a personal exemption *in favor of the defendant.* Ex parte Wisner, 203 U. S. 449, overrules the decisions last above mentioned. The doctrine laid down by the Wisner Case, and In re Moore, 209 U. S. —, is that in such case a motion to remand made by the plaintiff must be allowed; that the plaintiff can waive his right to a remand, and that the defendant, by removing, has waived any objection on his part based merely on the fact that neither party resides in the district.

Western Loan Co. *v.* Butte Co., 209 or 210 U. S. (decided June 1st, 1908), was a case in which a citizen of Utah brought an original action in the federal circuit court for the district of

Montana against a citizen of New York. The defendant filed a demurrer in which he objected to the jurisdiction and in which he also objected on the ground that the complaint did not state a cause of action. The Supreme Court held, that such action on the part of the defendant waived the objection to the jurisdiction.

Place of Session for Original Proceeding.

The apparently rather wide spread uncertainty as to the proper place of session for the institution of original proceedings, may arise from the absence of any federal statute on the subject applicable to this state. So far as now occurs to me the plaintiff is, as a rule, free to choose among the several places of session in the proper district. If, however, the place of session chosen for instituting the proceeding is unduly inconvenient, an order of transfer may be made to take the case to some other place of session within the district.

The Place of Session on Removal.

The provisions of the particular statute under which the removal is to be made should be looked to more carefully than seems to be usual in order to determine the proper place of session of the federal court at which the papers are to be filed.

In removals from the state court under §§ 643 and 644, U. S. Revised Statutes, the direction is "into the circuit court next to be holden in the district." In the Judiciary Act of 1875, as amended (18 Stats. 470, 24 Stats. 552, 25 Stats. 433; 1 U. S. Comp. Stats. 508, et seq.; 4 Fed. Stats. Ann. 349) the place of session of the federal court at which the transcript is to be filed is not as clearly set forth as could be wished. It is probably to be read as meaning that the copy of the record of the state court should be filed in the office of the clerk of the federal circuit court (of the district in which the proceeding was instituted) at that place of session at which the first term of said federal court is to be held after the filing of the petition and bond for removal in the state court. In this connection it is to be noted that it has been held (overruling some prior decisions), that the petition and bond for removal may be presented to the judge of the state in vacation. Remington *v.* Railroad, 198 U. S. 95, 99; Johnson *v.* Scale Co., 139 Fed. 339, 343; Noble *v.* Ass'n, 48 Fed. 337; Loop *v.* Winter's Estate, 115 Fed. 362; Groton *v.* American Co., 137 Fed.

284, 289. Moreover, it seems that neither excusable delay, nor error in the place of filing the transcript will necessarily prevent the federal court from taking jurisdiction. Removal Cases, 100 U. S. 457, 475; Railway *v.* McLean, 108 U. S. 212; Martin *v.* Railroad, 151 U. S. 673, 688; 4 Fed. Stats. Ann. 380.

It should be further noted that it has been held in the important case of Ex parte Wisner, supra, 203 U. S. 449, 457, that removals under section 2 of the Act of 1887-8, supra, can only be made where the suit is one which the plaintiff could have originally brought in the federal court.

Cessation of Jurisdiction of State Court on Removal.

Just when the jurisdiction of the state court ceases, whether on the filing of the petition and bond "in the state court" (or, since Remington *v.* Railroad, supra, in the clerk's office of the state court), or only after presentation of these papers to the state court or to the judge thereof in vacation, is probably to be regarded as a disputable question. In Mays *v.* Newlin, 143 Fed. 574, will be found a citation to many of the authorities and a statement of the reasons which lead me to think that presentation of the petition and bond to the state court, or to the judge thereof in vacation, is necessary to bring to an end the jurisdiction of the state court.

Failure or Refusal of State Court or Judge to Order Removal.

The Supreme Court has said: "If the cause is removable and the statute for its removal has been complied with, no order of the state court for the removal of the cause is necessary to confer jurisdiction on the United States court, and no refusal of such an order by the state court can prevent the jurisdiction from attaching." Kern *v.* Huidekoper, 103 U. S. 485, citing Insurance Co. *v.* Dunn, 19 Wall. 214. See also, Dabney Federal Jurisdiction and Procedure, p. 58; 4 Fed. Stats. Ann. 362; Hughes' Federal Procedure, p. 340; 2 Foster's Federal Practice, 3d Ed., p. 933. These authorities should remove one of the commonest misconceptions concerning removal procedure.

The Time for Filing Removal Papers.

No little confusion of thought prevails as to the time for filing removal papers.

Confining what follows as to removals under the Judiciary Act of 1875, as amended, it is to be noted that removals because of

prejudice or local influence may be made at any time "before the trial." It has been held that this means prior to the first trial. Dabney, § 34. But what constitutes "a trial" within the meaning of this statute is to some extent an unsettled question. See 2 Foster, 3d Ed., p. 945; 4 Fed. Stats. Ann., p. 344, et seq. On removal for other causes, generally speaking, the petition and bond for removal must be filed at or before the time when by the state law the defendant is required to file a pleading of any character—usually not later than the day for filing pleas in abatement. Kansas City R. Co. *v.* Daughty, 138 U. S. 298, 303; Martin *v.* Railroad, 151 U. S. 673, 687; Goldey *v.* Morning News, 156 U. S. 518; Railway *v.* Brow, 164 U. S. 271; Powers *v.* Railway, 169 U. S. 92. But delay in filing removal papers may be waived. Martin *v.* Railroad, supra.

However, when an amended pleading filed by the plaintiff for the first time discloses or gives the right of removal (e. g., by dismissing as to certain defendants, or by increasing the amount in controversy) the petition and bond may be filed at or before the time when any defensive pleading in opposition to such amended pleading is required under the state law or rules of practice. Powers *v.* Railway, 169 U. S. 92; Jones *v.* Mosher, 107 Fed. 561, 563. See also, Guarantee Co. *v.* Hanway, 104 Fed. 369, 374; Enders *v.* Railroad, 101 Fed. 202; Green *v.* Valley, 101 Fed. 882.

Local Actions under the 8th Section.

It seems that many of the bar doubt if an action of ejectment falls within the language of this section. In Dabney's Fed. Juris., pp. 150, 151, it is said: "Suits of the character here described are in rem, or local, in character. They must obviously, as a general rule, *if not always* be brought on the equity side of the federal courts, * * * ." However, in Spencer *v.* Stockyard Co., 56 Fed. 741, jurisdiction of an action of ejectment was maintained under this statute. And it seems probable that the conclusion there reached (p. 745) will be upheld. In the Act of June 1st, 1872 (17 Stats. 198), the language is: "That when in any *suit in equity,* commenced in any court of the United States, to enforce any legal or equitable lien or claim against real or personal property * * *." In the Revised Statutes (both in the first and second editions), § 738 reads: "When any defendant in a *suit in*

equity to enforce any legal or equitable lien or claim * . * *." In the present statute (18 Stats. 472), the language is: "That when in *any suit,* commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to * * *." In Crawford *v.* Burke, 195 U. S. 176, 190, the well known doctrine is thus stated: "* * * a change in phraseology creates a presumption of a change in intent." Little force can be given to the use of the word "suit" (as distinguished from "action") in the present statute. Almost innumerable instances occur where the word suit is used in statutes with intent to include actions at law as well as suits in equity.

Costs on Remand.

When a cause has been improperly removed to the federal court and an order of remand is made, doubt is not infrequently expressed as to the power of the federal court to decree as to the costs in the federal court. This doubt is created by Bank *v.* Cannon, 164 U. S. 319, in which the express provision of § 5 of the Act of 1875 was evidently overlooked, and in which it was held that there was no power to award costs. In view of later rulings of the Supreme Court, it seems that there is no real doubt as to the power of the federal court to "make such order as to costs as shall be just." Great Southern Co. *v.* Jones, 177 U. S. 449; Cochran *v.* Montgomery. County, 199 U. S. 260.

Security for Costs and Proceedings in Forma Pauperis.

Motions that nonresident complainants in equity be required to give security for costs are so infrequent as to suggest a general belief that the federal equity court has no power to require such security. While the statute is not the sources of the chancellor's power, the practice seems to be established. See Steam Cutter Co. *v.* Jones, 13 Fed. 567; Hugonin *v.* Thatcher, 18 Fed. 105; Uhle *v.* Burnham, 46 Fed. 500; Deprez *v.* Electric Co., 66 Fed. 22; Hazleton *v.* Railway Co., 72 Fed. 325.

In a civil common law proceeding the state statute is followed, except that the bond is usually made payable to the United States or to the defendant. See Miller *v.* Railroad Co., 47 Fed. 264.

It does not seem to be generally understood that proceedings in forma pauperis are governed by the Act of Congress of July

20, 1892 (27 Stats. 252; 2 Fed. Stats. Ann. 294; 1 U. S. Comp. Stats. 706) and that the state statute has no application, even in a civil common law case. It is held in Bradford *v.* Railway, 195 U. S. 243, that this federal statute does not apply to appellate proceedings. See also Bristol *v.* U. S., 129 Fed. 87.

Federal Judgment Liens.

The former troubles of title examiners because of federal judgments (U. S. *v.* Humphries, 3 Hughes, 201, Fed. Cas. 15422) are in great measure relieved, as to judgments and decrees rendered since January 24, 1890, by the Act of Congress of 1888 as amended (25 Stats. 357; 28 Stats. 814; 1 U. S. Comp. Stats. 701; 4 Fed. Stats. Ann. 5) and the Act of Legislature of January 24, 1890 (Acts, 1889-90, p. 22; Code, 1904, § 3559a). But I am under the impression that many examiners pass upon the title of land lying in the county wherein federal judgments and decrees are rendered without examining the federal court lien dockets. A reading of the third section of the congressional statute referred to will show the danger in this course, as that section, under the circumstances prevailing in this state, retains the lien of judgments and decrees of the federal courts on real estate in the county in which they are rendered without docketing in the state court clerk's office.

Notice of Pending Suits.

Within my own knowledge many title examiners in this state pass opinions with false reliance on the Virginia statute (Code, 1904, § 3566) requiring memoranda of attachments and pending suits to be recorded in order to bind certain purchasers. Rutherglin *v.* Wolf, 1 Hughes 78, Fed. Cas. 12175, and the affirmance of King *v.* Davis (137 Fed. 222, 11 Va. Law Reg. 177, 463), in Blankenship *v.* King, 157 Fed. 676, seem sufficient authority for saying that purchasers pendente lite take subject to the result of the suit in any federal court in any part of the district. It follows that the examination of the title of a real estate in Richmond, for instance, is not safely to be regarded as concluded, until the dockets of the federal courts in Richmond, Alexandria and Norfolk have been looked to for pending suits.

Sales of Property under Federal Decrees or Orders.

The fact that there is a federal statute regulating the place for

selling, and the manner of advertising sales of, real and personal property sold under decrees and orders, is frequently overlooked.

Of this statute (Act of March 3, 1893, 27 Stats. 751; 3 Fed. Stats. Ann. 54; 1 U. S. Comp. Stats. 710; Desty, § 526a), it seems necessary to say here only that it directs that sales of real estate shall be at public auction at the courthouse of the county or city in which the property, or the greater part thereof, is located, or upon the premises.

See Godchaux *v.* Morris, 121 Fed. 482; National Nickel Co. *v.* Syndicate, 103 Fed. 399, 112 Fed. 44; Black *v.* Black, 77 Fed. 785; Wilson *v.* Insc. Co., 65 Fed. 38.

EQUITY PROCEDURE.

Equity Rules.

It may be only the tyro who ventures into the federal equity court without being fresh from a reading of the Equity Rules. But it seems to be rather generally thought that the exact meaning of these rules is readily comprehended. Such conclusion is not, as I think, entirely warranted. Opinions which on casual reading seem to be authoritative rulings on the meaning of some rule in its present form, on closer study are often found to be constructions of the rule as it was phrased before amendment.

Inasmuch as the Equity Rules are readily found only in their present form, the following data may occasionally prove helpful:

Chronology of Federal Equity Rules.

The original equity rules, thirty-three in number, were promulgated in February, 1822. See 7 Wheat. XVII. The ninety-one rules of March, 1842, are found in 17 Peters LXI a volume frequently not found in what purports to be a complete set of United States Supreme Court Reports.

Rule 92 was promulgated April 18, 1864, 1 Wall. V; Rule 93, January 13, 1879, 7 Otto V; Rule 94, January 23, 1882, 104 U. S. IX. Amendments of the rules of 1842 have been made from time to time, as follows: Rule 12, Dec. 17, 1900, 180 U. S. 641; Rule 13, May 3, 1875, 21 Wall. V; Rule 18, Oct. 28, 1878, 7 Otto VI; Rule 19, Oct. 28, 1878, 7 Otto VI; Rule 40, Dec. term, 1850, 10 How. IV; Rule 41, May 6, 1872, 13 Wall. XI; Rule 59, Mar. 5, 1889, 129 U. S. append. 1; Rule 67, Jan. 22, 1856, 17 How.

IX; Dec. term, 1861, 1 Black 6; Dec. term, 1869, 9 Wall VII; May 11, 1891, 139 U. S. 707; May 2, 1892, 144 U. S. 689; May 15, 1893, 149 U. S. 793; Rules 82 and 89, Oct. 1893, U. S. 709, 710.

Institution of the Suit.

While it is generally well known that a suit in equity in a federal court is instituted by filing the bill in the clerk's office (Eq. Rules 11, 12) and that the first Monday of each month (unlike the practice in common-law causes) is the only rule day (Eq. Rule 2); it seems not to be so well known that substituted service of process must be made on an *adult* member or resident of the defendant's family (Eq. Rule 13), and that the absence from the Equity Rules of a provision for publication of process does not authorize the adoption of the state practice in this respect. (1 Bates Fed. Eq. Proc., § 48). The constructive notice by warning order, authorized by § 8 of the judiciary act of 1875 (18 Stats. 472; 1 U. S. Comp. Stats. 513; 4 Fed. Stats. Ann. 381), is an order of court (never made by the clerk) which is to be personally served if practicable wherever the defendant is found, and it is only where the impracticability of personal service is made to appear that the order may be published—for not less than *six* weeks.

Pleadings Subsequent to the Bill.

Whenever it is because of the state statute (§ 3275, Code) allowing an answer to be filed at any time before final decree, or for some other reason, it is a fact that a large majority of the bar seem to act on the theory that such is necessarily the federal practice. If the Equity Rules are designed more for any one purpose than another, it would seem that such purpose is to prevent and in a sense to penalize unnecessary delay. The stringent provisions of Rules 18 and 19 are rarely borne in mind, and yet it is with difficulty, if at all, that forgetfulness of the rules can be considered as "cause" for setting aside a decree pro confesso.

The provisions of Rule 31, requiring certificate of counsel and affidavit to pleas and demurrers, are often overlooked; and the requirement that the grounds of demurrer be set out is, perhaps, complied with more frequently under the influence of the state statute than because such was the practice of the High Court of Chancery. (1 Bates, § 203).

Rule 45, forbidding special replications, is less frequently disregarded than is the rule (66) fixing the time within which the general replication must be filed, and directing the dismissal of the bill for failure or refusal to file such replication within the time limit. The form of general replication is given in 1 Bates Fed. Eq. Proc., § 366; 1 Foster's Fed. Pr. (3d. Ed.) p. 361; Sand's Suit in Equity (2d Ed.) p. 391. The rules require that the replication be reduced to writing and actually filed.

Of the many remaining requirements of the rules as to the pleadings, their nature and the time for filing, space is wanting for more than the observation that the practice in the state trial courts is frequently a thoroughly unsafe guide.

Time Limits for Adducing Evidence.

Since June 29, 1906, the competency of witnesses has been regulated by the state law. 34 Stats. 618. And by the Act of Congress of March 9, 1892 (27 Stats. 7; 1 U. S. Comp. Stats. 664; 3 Fed. Stats. Ann. 22) the depositions of witnesses may be taken in the mode prescribed by the laws of this state. While these provisions relieve this part of the federal equity practice of some difficulties, the requirements of Rule 69 seem to be seldom remembered: "Three months and no more shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. * * *." In Ingle *v.* Jones, 9 Wall. 486, 499, decided at the December term 1869, it was held that it was the duty of the defendants to commence taking their depositions as soon as the cause was at issue. The court said: "They had no right to wait until the complainant was through." However at that same term an amendment to Rule 67 was promulgated (9 Wall. VII) which reads as follows: "Where the evidence to be adduced in a cause is to be taken orally [before an examiner] as provided in the order passed at the December term, 1861 [1Black VI] amending the 67th General Rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be

taken in the cause, unless by agreement of the parties, or by leave of court first obtained, on motion for cause shown."

No reason at present suggests itself why apportionment of the time for taking depositions should not be made where the depositions are to be taken according to the state practice.

Infant Parties—Time Limits.

It seems to be not generally understood that a guardian ad litem is not appointed by the clerk, but must be appointed by the court, or a judge thereof (Eq. Rule 87). And it has been held erroneous for the court to decree in favor of a plaintiff against an infant defendant upon admissions made in the answer of a guardian ad litem, without proof of the allegations of the bill. (1 Bates, § 339; Bank *v.* Ritchie, 8 Pet. 128, 144).

The provision (Eq. Rule 83) allowing no more than one month within which to file exceptions to a master's report after a reference; is not generally disregarded; but this rule is often erroneously supposed to relate to reports of sales. Mining Co. *v.* Mason, 145 U. S. 349, 363.

The practice in regard to confirming reports of sales is quite unlike that of the state courts. Of the two slightly differing practices in the federal courts one is stated in Williamson *v.* Berry, 8 How. 546; 2 Bates Fed. Eq. Proc., § 724. It is for the purchaser to give notice to the solicitors in the cause that he will on the day stated in the notice move for a decree of confirmation nisi. This decree is to the effect that the sale will stand confirmed at the expiration of a short period (usually eight days) unless cause be shown against it in the meantime. In Mining Co. *v.* Mason, 145 U. S. 349, 364 (see 1 Foster, 3d Ed, 696) the other practice indicated is for the purchaser to obtain, without previous notice, a decree nisi and to serve it on the solicitors. Where this practice is followed the time for exceptions begins to run from service of the decree nisi.

FEDERAL EQUITY JURISDICTION.

Adequate Remedy at Law.

Section 723 R. S. (4 Fed. Stats. Ann. 530; 1 U. S. Comp. Stats. 583) reads: "Suits in Equity shall not be sustained in

either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." The fact seems to be frequently overlooked that this statute does not refer to legal remedies first given by state statutes enacted after the date of this statute—Sept. 24th, 1789. In McConihay *v.* Wright, 121 U. S. 201, 206, it is said: "The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by act of Congress." See also, Mississippi Mills *v.* Cohn, 150 U. S. 202, 205; Smith *v.* Ames, 169 U. S. 466, 516.

Necessity for Pre-Existing Lien.

Section 2460, Code, 1904—giving simple contract creditors a right to sue in equity to set aside fraudulent conveyances made by the debtor—has been relied upon somewhat frequently as giving the federal courts in this state a similar jurisdiction in equity. It has been held, that there is no such federal equity jurisdiction either of a suit originally instituted in the federal court (Scott *v.* Neely, 140 U. S. 106; Hollins *v.* Brierfield, 150 U. S. 371; Viquesney *v.* Allen, 131 Fed. 21) or of one removed from the state court (Cates *v.* Allen, 149 U. S. 451). See also, Dormitzer *v.* Ill. Bridge Co., 6 Fed. 215, 218; Putney *v.* Whitmire, 66 Fed. 388; Tompkins *v.* Catawba Mills, 82 Fed. 782; Bank *v.* Prager, 91 Fed. 692; Craddock *v.* Fulton, 140 Fed. 426.

Attachments in Equity on Removal.

Bills in equity and attachments thereon, under § 2964, Code, 1904, on removal to the federal court, frequently give rise to no little trouble. Where such a bill on removal presents only a legal cause of action, although jurisdiction may in some cases be taken, the complainant is required to recast his pleading and file a declaration on the law side of the court. Whittenton *v.* Packet Co., 19 Fed. 273; Simonton Fed. Courts, p. 128.

Where such a bill presents both legal and equitable causes of action, the former are to be embodied in a declaration, to be proceeded with on the law side of the federal court, while the equitable rights set up in the bill will be proceeded with on the equity side of the court. Chapman *v.* Lumber Co., 74 Fed. 444, 143 Fed. 201.

CIVIL COMMON LAW PROCEDURE.

The Conformity Act.

Perhaps the commonest misconceptions concerning federal procedure in civil common law causes arise from a too great reliance upon the seeming meaning of the Conformity Act. This statute, adopted in 1872, reads as follows:

> "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Sec. 914, Rev. Stat.; 4 Fed. Stats. Ann. 563; 1 U. S. Comp. Stats. 684; Desty, § 436

But this statute must be read in connection with certain established rules:

(1) As of course, no requirement of the federal constitution can be affected by any state law or rule of practice. For instance, the distinction between common law and equity causes prevailing in the federal courts is a constitutional requirement, and no rule of state practice is allowed to obliterate or confuse this distinction. Scott *v.* Armstrong, 146 U. S. 499; Whittenton *v.* Packet Co., 19 Fed. 273.

(2) The Conformity Act does not apply when Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts (Southern Pac. Co. *v.* Denton, 146 U. S. 202, 209); nor when to adopt a state rule of practice would be inconsistent with the terms, defeat the purpose, or impair the effect of, any legislation of Congress. (Luxton *v.* Bridge Co., 147 U. S. 337, 338.)

(3) The Conformity Act was not intended to fetter the judges of the federal courts in the personal discharge of their accustomed duties, or to trench upon the common law powers with which they are in this respect clothed. Mudd *v.* Burrows, 91 U. S. 426, 442; R. Co. *v.* Horst, 93 U. S. 291, 299; Mutual Ass'n *v.* Barry, 131 U. S. 100, 120; Lincoln *v.* Power, 151 U. S. 436, 442; Grimes Co. *v.* Malcolm, 164 U. S. 483, 490.

Rule Days—Jurisdictional Averments.

While it is generally understood that the rule days in the clerk's office of the federal courts for civil common law causes (differing here from the equity practice) are the same in number and contemporaneous with those in the state courts; and also that civil common law pleadings are, in general, the same as in the state courts; it does not seem to be generally kept in mind that certain jurisdictional averments must most usually be made in the declaration. In too many declarations there is no averment as to the citizenship of the parties, and in some there is a failure to aver the value of the matter in controversy.

Judgments on Motion.

The simple and expedient practice of judgments on notice and motion, under § 3211, Code, 1904, seems to be almost unused in the federal courts in this state. I know no sufficient reason for holding that such procedure is not authorized. See In re Louisville Underwriters, 134 U. S. 488, 492; Dabney Fed. Juris., § 102; Leas *v.* Merriman, 132 Fed. 510. The contention that the notice must issue from the clerk's office, under his hand and the seal of the court (Hughes' Fed. Proc., p. 357), would seem to be refuted as to this circuit at least by the decision of the Circuit Court of Appeals of this circuit in Blankenship *v.* King, 157 Fed. 676, which was a review of the case of King *v.* Davis, 137 Fed. 198, an action of ejectment commenced by service of the declaration and a notice drafted and signed only by counsel. On the review section 911 R. S. was relied upon and the question was fairly presented to and considered by the appellate court. In Leas *v.* Merriman, supra, there is a review of the authorities on this question.

Peremptory Challenges in Civil Cases.

While it may be generally understood that the subject of peremptory challenges in criminal trials is governed by the federal statute (§ 819, Rev. Stat. 1 U. S. Comp. Stats. 629; 4 Fed. Stats. Ann. 745), the fact is apparently often overlooked that this same atatute allows three peremptory challenges to each side in civil cases. But where there are several defendants or several plaintiffs the parties on each side are deemed a single party.

Where two actions, brought by the same plaintiff against dif-

ferent defendants, are consolidated for trial, each defendant is entitled to three peremptory challenges. Mut. Co. *v.* Hillmon, 145 U. S. 285. And it has been held by the Circuit Court of Appeals for this circuit, that the plaintiff, under such circumstances, is to be allowed as many challenges as are allowed all of the defendants. Butler *v.* Publishing Co., 148 Fed. 821.

Subpœnas for Witnesses and Depositions.

While it seems usually well understood that subpœnas for witnesses in civil causes do not "run" outside of the district of trial, except where the witness (outside the district) lives not exceeding one hundred miles from the place of trial (§ 876, Rev. Stat.); yet the Act of Congress of 1892 (27 Stats. 7; 3 Fed. Stats. Ann. 22; 1 U. S. Comp. Stats. 664; Desty, § 381a), authorizing depositions at law or equity to be taken in the mode prescribed by the laws of the state, seems to have created a wide spread misconception concerning the use of depositions in common-law causes. It is sufficient to say here that, while depositions for use in common-law causes may be taken either in the *mode* set out in the Revised Statutes (§ 863, et seq.) or in the mode followed in the state practice, yet the occasions when depositions may be read in such trials in the federal courts are only those enumerated in the Revised Statutes (§ 863, et seq.; 1 U. S. Comp. Stats. 661, et seq.; 3 Fed. Stats. Ann. 8, et seq.; Desty, § 382, et seq.). See Hanks *v.* Tooth Crown Co., 194 U. S. 303; Nat'l Register Co. *v.* Leland, 77 Fed. 242, 94 Fed. 502; 3 Fed. Stats. Ann. 502.

Legal and Equitable Counterclaims.

The Virginia statute (§ 3299, Code, 1904) relating to special pleas of setoff, has given rise to much trouble in the federal law courts in this state because of the doctrine that no state statute shall be permitted to obliterate the ancient distinction between law and equity causes. While matter of counterclaim of *legal* nature may be pleaded in a law cause in the federal courts (Partridge *v.* Ins. Co., 15 Wall. 573, 580; Dabney Fed. Juris., § 117; Chainley *v.* Sibley, 73 Fed. 980; Arkwright *v.* Aultman, 128 Fed. 195, 6; Anglo Co. *v.* Lombard, 132 Fed. 721, 732); purely equitable defenses are not allowed to be set up in such causes. Scott *v.* Armstrong, 146 U. S. 499, 512; Lantry *v.* Wallace, 182 U. S. 536, 549; Cook *v.* Foley, 152 Fed. 41, 52. And this rule

applies in a cause removed from a state court as well as in a cause originally instituted in a federal court. R. Co. *v.* Payne, 119 U. S. 561.

In this connection it may be noted that matter of estoppel in pais has been held to be a legal defense. Dickerson *v.* Colgrove, 100 U. S. 578, 584. See, also, Cleveland *v.* R. Co., 93 Fed. 113, 123; Marine Iron Works *v.* Wiess, 148 Fed. 145, 154.

Opinions on Facts and Directing Verdicts.

It may be well enough known that the federal trial judge often expresses his opinion on the facts to the jury (Mudd *v.* Barrows, 91 U. S. 426; Railroad *v.* Putnam, 118 U. S. 545; Lovejoy *v.* U. S., 128 U. S. 173; Doyle *v.* Railroad, 147 U. S. 430), and that he frequently does and often must direct verdicts for either the plaintiff or defendant (Schuchardt *v.* Allen, 1 Wall. 370; Hickman *v.* Jones, 9 Wall. 201; Imp. Co. *v.* Munson, 14 Wall. 448; Manning *v.* Ins. Co., 100 U. S. 677; Bowditch *v.* Boston, 101 U. S. 18; Howard *v.* R. Co., 101 U. S. 844; Stewart *v.* Lansing, 104 U. S. 512; Marande *v.* Texas, 184 U. S. 192; Grand Chute *v.* Winegar, 15 Wall. 368; Hendrick *v.* Lindsay, 93 U. S. 143; Russell *v.* Allen, 107 U. S. 162; Marshall *v.* Hubbard, 117 U. S. 419; North Penn. Co. *v.* Bank, 123 U. S. 733; Butler *v.* National Home Co., 144 U. S. 72; Richmond Works *v.* Ramsey, 131 Fed. 197); but there is frequent oversight of the rule that if a motion to direct a verdict is overruled and evidence is thereafter introduced by the party who made the motion, the error, if any, in overruling the motion is held to be waived, unless the motion be renewed at the close of all of the testimony. Grand Trunk R. Co. *v.* Cummings, 106 U. S. 700; Robertson *v.* Perkins, 129 U. S. 233; Wilson *v.* Haley, 153 U. S. 39.

Demurrer to Evidence.

It follows from the power to direct verdicts, that demurrers to evidence are practically unknown in the federal practice in this state. The same result, without the attendant risk, may be obtained by a motion to direct a verdict.

BANKRUPTCY.

Acts of Bankruptcy.

Under ordinary circumstances bankruptcy practice will not very often engage the attention of the majority of the state court prac-

titioners. However, there is one matter that is deserving of more general attention than it has received. It is apparently a common occurrence for even well informed and prudent members of the bar to advise and participate in the commission by their clients of certain "acts of bankruptcy." Of the acts of bankruptcy set out in the statute (B. A., § 3) those most commonly committed under imprudent legal advice are: (1) making general assignments for the benefit of creditors; (2) applications by corporations for receivers under the state law; and (3) preferential payments and transfers by insolvent debtors.

By far the most usual misapprehension in this connection is the belief that making a general assignment is not an act of bankruptcy, if the deed directs the assignee or trustee to forthwith convert the assets and distribute without preference and pro rata among all the creditors. See Loveland on Bankruptcy, 3d, Ed., p. 200; Collier on Bankruptcy, 6th Ed., p. 49.

FORFEITURE PROCEEDINGS.

Forfeiture is now denounced as a penalty for violation of so many federal statutes, that this branch of federal practice is growing in importance. While there is a chapter in the Code of 1904 (chap. 98) prescribing a simple and well worked out procedure for the enforcement of forfeitures, these provisions are held not to be applicable in the federal courts. Coffey *v.* U. S., 117 U. S. 233.

It must suffice here to say that, except that issues of fact are tried before a jury and that the method of review is by writ of error, the procedure is that prevailing in the admiralty courts in the trial of in rem proceedings. Coffey *v.* U. S., 116 U. S. 427, 435, 117 U. S. 233; Miller *v.* U. S., 11 Wall. 268, 303. Rules of court governing forfeiture proceedings in the Western District have been prepared and printed and can be obtained gratis on application to any of the clerks.

CRIMINAL CAUSES.

Ordinary Federal Criminal Procedure.

Excluding from consideration the procedure prescribed in § 722, Rev. Stat., for the trials therein referred to (of which Mr. Justice Clifford—Tennessee *v.* Davis, 100 U. S. 257, 298—it is said that

it is "mere jumble of federal law, common law and state law * * * which in legal effect amounts to no more than a direction to a judge * * * to conduct the same as well as he can *. * *"); and also omitting mention of the procedure to be followed in prosecutions removed from a state court under § 643, Rev. Stats., the procedure in ordinary criminal causes in the federal trial courts in this state cannot safely be assumed to be the same as the present procedure in the state courts. And this assumption is the ground for many prevalent misconceptions concerning the procedure.

In Conklin's Treatise, 4th Ed., p. 567, it is said: "But * * * while no resort can be had to the common law as a *source* of criminal jurisdiction, it nevertheless furnishes the proper, and, as the state laws are here inoperative, the only guide, in the absence of constitutional or [federal] statutory regulations, as to the principles and rules of procedure in the exercise of this branch of jurisdiction."

In U. S. *v.* Shepard, 1 Abb. 431, Fed. Cas. 16273, it is said: "* * * state laws do not control in criminal proceedings in the United States courts, either in the mode or form of charging the offense, in the rules of evidence, or in the manner of conducting the trial. On the contrary, the proceedings throughout are according to the course of the common law, except so far as has been otherwise provided by the laws of congress or by constitutional provision."

In U. S. *v.* Nye, 4 Fed. 888, 890, it is said: "* * * unless there be an express [federal] statute to the contrary, we are governed by the general common law procedure, in the administration of criminal law and in criminal jurisprudence we go to the common law for the purpose of ascertaining the modes of practice, the modes of procedure, the rights of defendants, the rights of the government, the duty of the court and the duty of the jury, and we administer it according to that."

In U. S. *v.* Reid, 12 How. 360 (1851), the question before the court was the competency of a witness, incompetent under the rule of the common law, and made competent by a Virginia statute of 1849. It is said:

"* * * it could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of

prescribing the rules of evidence in trials for offenses against the United States. * * * And the law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789. * * *.

"The Judiciary Act of 1789, § 20, provides for the manner of summoning jurors, * * *.

"The Crimes Act * * * of 1790, § 29, makes some further regulations, * * * in relation to the proceedings and right of peremptory challenge * * *.

"But neither of these acts makes any express provision concerning the mode of conducting the trial after the jury are sworn. They do not prescribe any rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined. * * * the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress, was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts. * * *.

No law of a state made since 1789 can affect the *mode of proceeding* or the *rules of evidence* in criminal cases."

In Logan *v.* U. S., 144 U. S. 263, 302 (1891), it is said: "For the reasons above stated, the provision of § 838 of the Revised Statutes, that 'the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty,' has no application to criminal trials; * * *."

And this section by Act of June 29, 1906, has been amended so as to read: "The competency of a witness to testify in any *civil* action, suit or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held." 34 Stats. 618.

In this connection it is to be remembered that the Conformity Act of 1872 (§ 914, Rev. Stat.) in terms applies only to civil common-law causes.

On the subject of criminal procedure see U. S. *v.* Marchant, 12 Wheat. 480; St. Clair *v.* U. S., 154 U. S. 134, 153; U. S. *v.*

Block, 4 Sawy. 211, Fed. Cas. 14609; U. S. *v.* Hawthorne, 1 Dill. 422, Fed. Cas. 15332; U. S. *v.* Williams, 1 Cliff. 5, Fed. Cas. 16707; U. S. *v.* Maxwell, 3 Dill. 275, Fed. Cas. 15750; U. S. *v.* Cameron, 15 Fed. 794, 796; Erwin *v.* U. S., 37 Fed. 470, 488; U. S. *v.* Hall, 53 Fed. 352; U. S. *v.* Insley, 54 Fed. 223; Howard *v.* U. S., 75 Fed. 986; Wolfson *v.* U. S., 102 Fed. 145; U. S. *v.* Davis, 103 Fed. 465; Winthaup *v.* U. S., 127 Fed. 530; 1 Wigmore Ev. 18.

Federal Definition of Felony.

In this connection should be mentioned a common misapprehension as to the distinction in the federal courts between misdemeanors and felonies.

The average federal criminal statute merely forbids some act and affixes the penalty. In such cases it is usually assumed that the offense can be classified as a misdemeanor or a felony dependent on imprisonment in a penitentiary being or not being the punishment. But in the federal courts we have no such simple criterion.

Perhaps the best effort at a definition of a felony in the federal courts is that in U. S. *v.* Coppersmith, 4 Fed. 198: (1) When the offense is declared by the federal statute to be felonious, either expressly or impliedly; (2) where Congress does not define an offense, but simply punishes it by its common-law name, and at common law it is a felony; (3) where Congress adopts a state law as to an offense and under such law it is a felony. See, also, Bannon *v.* U. S., 156 U. S. 464; Ex parte Wilson, 114 U. S. 423; Reagan *v.* U. S., 157 U. S. 301; U. S. *v.* Yates, 9 Fed 861, 865; Berkowitz *v.* U. S., 93 Fed. 455; Considine *v.* U. S., 112 Fed. 342.

This trouble may, however, be obviated. The proposed revision of the federal criminal laws contains a judicious paragraph (§ 329, S. B. 2982) reading: "All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

Process for Witnesses.

It seems most commonly assumed that processes for witnesses in a criminal cause do not run outside of the district. On the other hand, subpœnas for witnesses in a criminal

cause "run" in any district in the United States. (Section 876, Rev. Stat., 1 U. S. Comp. Stats. 667; 7 Fed. Stats. Ann. 1121.) But it is true that where an indigent defendant (under § 878, Rev. Stat. 1 U. S. Comp. Stats. 668; 7 Fed. Stats. Ann. 1122) makes the necessary affidavit and asks that his witnesses be summoned at the expense of the government, such witnesses must be found within the district, or within one hundred miles of the place of trial.

Defendants' Witnesses at Government Expense.

Section 878, U. S. Rev. Stats., reads:

> "Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the court in term, or any judge thereof in vacation, may order that such witnesses be subpœnaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States."

Under this statute is must appear by the affidavit of the defendant himself:

(1) That the defendant has been indicted in a United States court.

(2) That there are witnesses whose evidence is material to his defense.

(3) That he cannot safely go to trial without such witnesses.

(4). What he expects to prove by each witness named in the affidavit. This statement must be explicit and full.

(5) That such witnesses are within this district, or within one hundred miles of the place of trial. And here it is highly advisable to state as accurately as possible the place where each witness is, in order that service may be made.

(6) That the defendant is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses.

These requirements are very frequently overlooked.

The granting of such petitions has been held to be within the unreviewable discretion of the trial judge. Crumpton *v.* U. S., 138 U. S. 364; Goldsby *v.* U. S., 160 U. S. 70.

Bills of Particulars in Aid of Indictments.

In the federal courts it is a well established practice to require or allow bills of particulars in aid of faulty, but not strictly demurrable, indictments. Bannon *v.* U. S., 156 U. S. 464, 468; Dunbar *v.* U. S., 156 U. S. 185, 192; Coffin *v.* U. S., 156 U. S., 432, 452; Rosen *v.* U. S., 161 U. S. 29, 34, 35; Kirby *v.* U. S., 174 U. S. 47, 64; U. S. *v.* Bayaud, 16 Fed. 376, 382; U. S. *v.* Bennett, 24 Fed. Cases 1093, 1098; U. S. *v.* Adams Exp. Co., 119 Fed. 241; Rinkle *v.* U. S., 151 Fed. 759; Wharton Crim. Pl. & Pr. (9th Ed.) § 702, et seq.; 1 Bishop Crim. Proc. (2d Ed.), § 643, et seq.

Burden of Proving Insanity.

If, as is believed, the rule in the state courts requires of a defendant, relying on insanity, to prove insanity to the satisfaction of the jury (Boswell's Case, 20 Gratt. 860, 875; Baccigalupo *v.* Com., 33 Gratt. 807, 817; Honesty *v.* Com., 81 Va. 283, 300); it is worth remembering that the rule followed in trials of offenses against the United States is, that if the jury has from the evidence a reasonable doubt as to the sanity of the defendant at the time of the commission of the offense he should be acquitted. Davis *v.* U. S., 160 U. S. 469, 484; Hotema *v.* U. S., 186 U. S. 413, 416, 418.

Obtaining Copies of Government Records.

In criminal causes, and occasionally in civil actions, the opponent of the government may desire in evidence records of the Treasury Department. The method of obtaining such copies is pointed out in Treasury Department Rule IX, which, so far as we are at present concerned, reads: "In all cases where copies of documents or records are desired by, or on behalf of, parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only, and on a rule of the court upon the Secretary of the Treasury requesting the same."

Writs of Error Allowed Government.

Members of the bar who do not keep posted concerning federal legislation are frequently surprised on observing government counsel taking exceptions in criminal causes. By Act of March 2, 1907 (34 Stats. 1246; Supp. Fed. Stats. Ann. 193; Supp. 1907, U. S. Comp. Stats. 209) in criminal causes writs of error from the Supreme Court to the Circuit and District Courts may be taken by the government in certain cases. This act reads as follows:

> "That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or onstruction of the statute upon which the indictment is founded.
>
> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.
>
> The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.
>
> Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: Provided, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

General Features.

Some features of the federal criminal procedure, differing fron the state practice, are generally well understood: The subject of peremptory challenges is regulated by federal statute. (Section 819, Rev. Stat.; 1 U. S. Comp. Stats. 629; 4 Fed. Stats. Ann. 745). The judge, in the vast majority of cases fixes the punishment; he can, and in some cases must, direct verdicts of not guilty (France *v.* U. S., 164 U. S. 676); and he frequently gives the jury his opinion on the facts. (Simmons *v.* U. S., 142 U. S.

148; Starr *v.* U. S., 153 U. S. 625; Allis *v.* U. S., 155 U. S. 123; Breese *v.* U. S., 108 Fed. 804). Husbands and wives cannot testify for or against each other (U. S. *v.* Ried, 12 How. 360), and defendants may testify only because of a federal statute to that effect. (20 Statutes at Large 30; 1 U. S. Comp. Stats. 660; 7 Fed. Stats. Ann. 1120).

PROCEEDINGS FOR REVIEW.

Granting Writs of Error and Appeals—Assignments of Error.

The state practice is here no guide. The Conformity Act does not apply. Chateaugay Iron Co., 128 U. S. 544, 553; 11 Rose's Notes 662; 2 Supp. Rose's Notes 1080.

While it is generally well known that in equity and common-law causes, the trial judge can, and, most usually, does grant the appeal or writ of error, and that such review is of right; the provision of the Rules of the Circuit Court of Appeals regarding assignments of error are very frequently not sufficiently regarded. The assignment of errors must be filed with the clerk of the court below, and no writ of error or appeal shall be allowed until the assignment of errors shall have been filed. Where the error is to the admission or rejection of evidence, the assignment of error must quote the full substance of the evidence admitted or rejected. Where the error alleged is to the charge of the court the assignment must set out the part referred to in totidem verbis, whether it be in instructions given or in instructions refused. (C. C. A. Rule 11.)

Notwithstanding the great number of rulings by the Supreme Court and by the Circuit Court of Appeals of this circuit holding that the refusal of a trial court to set asine a verdict and grant a new trial will not be reviewed on writ of error, a great majority of the bar of this state persist in uselessly assigning such refusals as error. See R. Co. *v.* Horst, 93 U. S. 291, 301; Pritchard *v.* Budd, 76 Fed. 710, 716; Newport Co. *v.* Yount, 136 Fed. 589, 590; 2 Foster (3d Ed.), § 376.

Time for Appeals and Writs of Error.

Appeals and writs of error from the Supreme Court to the Circuit Court of Appeals under § 6 of the "Evarts Act" of March 3, 1891, 26 Stats. 826 (4 Fed. Stats. Ann. 409; 1 U. S. Comp. Stats.

549); are to be sued out within one year from the entry of the decree or judgment.

Appeals and writs of error from the Supreme Court to the federal trial courts, under § 5 of the Evarts Act, supra, must usually be sued out within two years. Rev. Stat. 1008; 4 Fed. Stats. Ann. 622, 1 U. S. Comp. Stats. 549; Allen *v.* R. Co., 173 U. S. 479; Holt *v.* Mfg. Co., 176 U. S. 68.

Appeals and writs of error from the Circuit Courts of Appeals to the federal trial courts, are as to final decrees and judgments usually limited to six months. Section 11 Evarts Act, supra. Appeals from interlocutory decrees by which an injunction is granted or continued or a receiver is appointed must be taken within thirty days. 34 Stats. 116.

Bills of Exceptions.

Bills of exceptions may be signed at any time during the trial term and not afterwards, unless during such term an order is made extending the time.

So far as I am advised it is permissible to prepare either one bill containing several exceptions, or several bills each containing one exception. Pomeroy *v.* Bank, 1 Wall. 592, 600.

Both the Supreme Court and the Circuit Court of Appeals of this circuit have expressed strong disapproval of the practice of incorporating verbatim copies of stenographic reports of evidence in bills of exceptions. In nearly every case the transcript can be much reduced in length by putting the examination of witnesses into narrative form. Both the consideration due to the judges of the appellate courts and the great reduction in expense to the parties should induce counsel to thus shorten the records.

Superseding Decrees and Judgments.

It does not seem to be generally understood that neither an appeal nor a writ of error supersedes the decree or judgment sought to be reviewed unless the bond given is a supersedeas bond—that is unless it is conditioned to pay damages, as well as costs (§ 1000, 1012, Rev. Stat.); nor unless (within sixty days exclusive of Sundays, from the entry of the judgment or decree complained of) a copy of the writ of error or appeal for the adverse party be lodged in the clerk's office where the record remains. Section 1007 and 1012, Rev. Stat. (4 Fed. Stats. Ann.

618, 624; 1 U. S. Comp. Stats. 714, 716; 2 Foster (3d Ed.), p. 1240; Kitchen *v.* Randolph, 93 U. S. 86; Danville *v.* Brown, 128 U. S. 503.) It has been held that there is no power to supersede a decree or judgment in a civil cause if the sixty day period has been allowed to elapse. Hogan *v.* Ross, 11 How. 294; Saltmarsh *v.* Tuthill, 12 How. 387; Hudgins *v.* Kemp. 18 How. 530; Railroad *v.* Harris, 2 Wall. 574; Com'rs *v.* Gorman, 19 Wall. 661; Kitchen *v.* Randolph, 93 U. S. 86; Sage *v.* Railroad, 93 U. S. 412; Western Co. *v.* McGillis, 127 U. S. 776; Foyles *v.* Law, Fed. Cas. 5024; The Roanoke, Fed. Cas. 11875; New England Co. *v.* Hyde, 101 Fed. 397; Logan *v.* Goodwin, 101 Fed. 655.

However, where the delay is excusable, the trial judge may—the term not having come to an end—set aside the order and enter it anew, thus protracting the period. Memphis *v.* Brown, 94 U. S. 715, 718; Kingman *v.* Western Co., 170 U. S. 675, 679; In re Wright, 96 Fed. 820; In re Hudson Co., 140 Fed. 49.

In this connection it should be noted that an appeal, even where the bond is for damages and costs, does not of itself supersede an order granting, refusing or dissolving an injunction. Leonard *v.* Ozark, 115 U. S. 465; Interstate Com. *v.* Railroad, 101 Fed. 146; Slaughter House Cases, 10 Wall. 273; Hovey *v.* McDonald, 109 U. S. 150; Knox County *v.* Harshman, 132 U. S. 14; Lalance *v.* Haberman, 54 Fed. 375; In re Haberman, 147 U. S. 525; Green Bag Co. *v.* Norrie, 118 Fed. 923, 128 Fed. 896.

In criminal causes the writ of error, if sued out and a copy lodged within the sixty days, operates as a supersedeas, without security (In re Claasen, 140 U. S. 200; Hudson *v.* Parker, 156 U. S. 277); and on writ of error granted after the expiration of the sixty days, it is said that it will also operate as a supersedeas if the judge signing the citation so directs. McKnight *v.* U. S., 113 Fed. 451.

Appellate Bankruptcy Proceedings.

In regard to appellate proceedings in bankruptcy, the fact that the procedure on petition for revision differs in some important respects from that on appeal, seems to be often lost sight of. The petition for revision (of matters of law only, B. A., § 24b) is filed in the office of the clerk of the Circuit Court of Appeals (at Richmond) and within thirty days therefrom the transcript of

the record must be there filed. A copy of the petition is served by the clerk of the appellate court on the respondent, or his solicitor. Rule 36, C. C. A. Fourth Circuit. The ten-day limitation on appeals does not apply to a petition for revision. Such petition should be filed within a reasonable time, and is probably never allowed after six months. Loveland, 3d Ed. 906; Collier, 6th Ed. 305. The procedure on an appeal in a bankruptcy case under § 25a B. A., follows that in an ordinary equity case; but is allowable only within ten days after the rendition of the judgment.